No. 81-96

Office-Supreme Court, U
FILED
AUG 27 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

(Attorneys' names appear on inside cover)

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 474-8101

SHIRLEY ADELSON SIEGEL
Solicitor General

Counsel of Record

PAUL, WEISS, RIFKIND, WHARTON,
& GARRISON
345 Park Avenue
New York, N.Y. 10154
(212) 644-8000
Co-Counsel for Appellants
Tully, Lynch and Koenig

SIMON H. RIFKIND
EDWARD N. COSTIKYAN
RICHARD D. FRIEDMAN
MICHAEL C. LASKY

Of Counsel

TABLE OF CONTENTS

	Page
A. JURISDICTION OF THIS COURT ON APPEAL .	1
B. THE § 1341 QUESTION.....	2
C. THE PREEMPTION ISSUE	5
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES	Page
Camp v. *Pitts*, 411 U.S. 138 (1973)	8
First Agricultural National Bank v. *Tax Commission*, 392 U.S. 339 (1968)	4, 5
Hines v. *Davidowitz*, 312 U.S. 52 (1941)	6 n
Louisville & Nashville R.R. v. *Motley*, 211 U.S. 149 (1908)	3
Maryland v. *Louisiana*, 101 S. Ct. 2114 (1981)	5n, 9n
Rosewell v. *LaSalle National Bank*, 101 S. Ct. 1221 (1981)	5
STATUTES	
Economic Stabilization Act of 1970, § 211	1-2
Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, as amended by the Energy Policy Pub. L. No. 94-163	*passim*
15 U.S.C. § 755(b)	6
28 U.S.C. § 1252	1n
28 U.S.C. § 1254	1, 2
28 U.S.C. § 1294	2n
28 U.S.C. § 1341	2-5
N.Y. Tax Law, § 1139(a)	3
Tenants Property Tax Rebate Act, N.J.S.A. 54:4-6.2 *et seq.*	3
OTHER AUTHORITY	
Philadelphia Inquirer, June 21, 1981	3

IN THE

Supreme Court of the United States

JAMES H. TULLY, JR., et al.,

Appellants,

—against—

MOBIL OIL CORPORATION, et al.,

Appellees.

JAMES H. TULLY, JR., et al.,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., et al.,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY
EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Several of the propositions advanced by appellees require response. Before responding, however, we note that nowhere in Appellees' Joint Motion to Dismiss or Affirm do they take issue with our assertion that, if the decision below is left unreviewed, its consequences will be severe for New York, its public transportation facilities, and its consumers.

A. Jurisdiction of This Court on Appeal

Appellees misread the Congressional intent behind ESA § 211(g). Clearly, the intent was to provide for prompt review of TECA decisions, not to foreclose appropriate means of review.* As appellees point out, Jt. M. at 11,** ESA § 211(g) provides that, if a petition for certiorari is filed within 30 days of the TECA judgment, this Court should review TECA decisions "in the same manner as" decisions of the circuit courts of appeals "as provided in section 1254 of title 18." But § 1254 does not prescribe any procedures for review by certiorari; it merely provides that certiorari is available at any time. Thus, if Congress had wished to provide for review of TECA decisions only by certiorari, it would have had no need to refer to 28 U.S.C. § 1254, which would add nothing to ESA § 211(g).

Rather, Congress incorporated § 1254 (not merely subsection 1, which refers to certiorari) because it sets forth the circumstances in which each type of review of a "court of appeals" decision is appropriate. A timely jurisdictional statement, which is in the alternative a petition for certiorari, Juris. St. at 3, must therefore trigger § 211(g) in the same way as does a

---

* We note that if § 211(g) limits review of TECA decisions to certiorari as appellees assert, then 28 U.S.C. § 1252, which provides for appeals to the Supreme Court from decisions by "any court of the United States" in a civil proceeding holding an Act of Congress unconstitutional, would be inapplicable. There can be no reasonable contention, however, that this appeal statute does not apply to TECA.

** "Jt. M.," "Juris. St.," and "Apdx." refer respectively to the appellees' Joint Motion, the appellants' Jurisdictional Statement, and the Appendix to the Jurisdictional Statement.

petition that is not also a jurisdictional statement; § 1254 then prescribes the appropriate type of review.*

Thus, even under the oil companies' view that TECA should not be deemed a "court of appeals" within the meaning of § 1254(2), this Court has appellate jurisdiction by virtue of the incorporation of § 1254 in ESA § 211(g). There is, moreover, no basis for the appellees' assertion, Jt. M. at 11,* that § 1254(2) does not apply of its own force to TECA decisions. First, § 1254 refers to the "courts of appeals" and TECA is a "court of appeals." Second, TECA functions in the same manner as the circuit courts of appeals. Third, if Congress intended to limit appellate jurisdiction under § 1254 to appeals from a *circuit* court of appeals, it would have amended the statute to so provide when it created TECA.**

In any event, the concern behind § 1254(2)—the gravity of invalidating a state statute—is no different whether the decision is made by TECA or by a circuit court of appeals. This should be a compelling consideration if the Court decides it has discretion to review the case. The policy and legislative history of § 1254(2) are not nullified by the fact that this Court has declined to hear a few cases, *see* Jt. M. at 13 n. 14, in which the litigants did not assert their right of appeal, but proceeded by way of certiorari.

B. The § 1341 Question

The oil companies assert that "there is nothing for this Court to review insofar as the Tax Injunction Act is concerned." Jt.

---

* That certiorari may be available in this case, see Jt. M. at 12 n. 13, is of no consequence. *Any* case subject to appeal pursuant to § 1254(2) is also subject to review by certiorari pursuant to § 1254(1). Indeed, appellees cite numerous cases in which parties with an indisputable right of appeal chose to seek review by certiorari. Jt. M. at 13 N. 14.

** The oil companies argue that, if § 1254 applies to TECA, TECA would have jurisdiction pursuant to §§ 1291 & 1292. There is no basis for this conclusion: ERSA § 211(b)(2) clearly modifies §§ 1291 & 1292, shifting part of the jurisdiction of the circuit court of appeals to TECA. In any event, TECA would not have venue except over cases within its jurisdiction under ESA. *See* 28 U.S.C. § 1294.

M. at 14. The § 1341 question, however, is one of the subject matter jurisdiction of the federal courts; as such, it is always open to review by this Court, even on its own motion, and would be open even had the State not raised the issue before.* *E.g. Louisville & Nashville R.R.* v. *Motley*, 211 U.S. 149 (1908). We are not, therefore, "again seeking review of the Second Circuit's decision," Jt. M. at 14, and discussion of how we might have done so is beside the point. We are asking the Court, in reviewing the TECA judgment, to decide a question that is necessarily presented: Did the District Court have jurisdiction?

The oil companies assert that the § 1341 question presented in this case is unlikely to recur. Jt. M. at 15-16. This statement does not square with the apparent efforts by appellee Mobil Oil Corp. to tie a provision similar to New York's passthrough prohibition to a recently-enacted Pennsylvania gasoline tax, in the hopes that this would cause invalidation of the entire tax. Philadelphia Inquirer, June 21, 1981, p. E1.

The Tax Injunction Act question presented by this case is in fact a broad one: whether any state tax statute prescribing the ultimate incidence of the tax is beyond the scope of § 1341. As indicated in our Jurisdictional Statement, at 13, the States have passed many such tax statutes. If plenary consideration is granted, we will show that New York's passthrough provision is similar in this respect to the statutes we have already cited and to others, *e.g.*, N.Y. Tax L. § 1139(a); Tenants Property Tax Rebate Act, N.J.S.A. § 54:4-6.2 *et seq.*, that fix the incidence of state taxes and refunds.

---

* In fact, the State has from the beginning of this litigation asserted the lack of District Court jurisdiction. As noted in our TECA brief, p. 12n, we continued to assert this point before TECA, but did not then press it; because of the unusual bifurcation of appellate jurisdiction over some EPAA issues, the Second Circuit had already decided the § 1341 issue at the Court of Appeals level, and it might have appeared obstructive to ask TECA to reconsider it. In raising the issue before the Supreme Court, we are pointing to a defect in the TECA judgment. Although the only Court of Appeals opinion on the question is by the Second Circuit, we are not now asking for review of its judgment.

We will also show that a provision doing so is a proper element of a tax statute. The oil companies offer no reason to challenge this fundamental fact, which *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339, 347-48 (1968), puts beyond question; that *First Agricultural* and its progeny were not § 1341 cases has no bearing on the matter.

The oil companies also rely on the Second Circuit's holding that § 1341 does not apply because it was a "calculated decision" of the State to allow the tax to fall if the passthrough prohibition were held invalid. Jt. M. at 16. The State, however, made that decision because in its view the passthrough prohibition was an integral element of the tax statute. If the Legislature had been silent on the question of severability, a court enjoining the passthrough prohibition would in all likelihood, under ordinary tests of severability, have enjoined the continuing levy of the tax itself.* Clearly, the fact that the Legislature chose to make explicit the passthrough prohibition's inseparability from continuing accrual of the tax is a fact supporting—not, as the oil companies would have it, opposing—applicability of § 1341.**

As the Court has recently noted, "the reasons supporting federal non-interference ['with so important a local concern as the collection of taxes'] are just as compelling today as they

---

* We do not imply that, in such a circumstance, a court could properly nullify previously-accrued liability. The Legislature made the issue moot in this case by explicitly providing that previously-accrued liability would not be affected by an injunction against the passthrough prohibition. Apdx. 100a.

** None of the Courts below have considered the oil companies' argument that § 1341 does not apply because federal jurisdiction is exclusive under the Economic Stabilization Act ("ESA"). That argument therefore provides no reason to deny plenary consideration of this case. If such consideration is granted, we will show that ESA gives the federal courts exclusive jurisdiction only over actions by a person "suffering legal wrong because of any act or practice arising out of this title." ESA § 210(a), Apdx. 71a. The oil companies claim that they have been injured by a New York law, not by an "act or practice arising out of" ESA or EPAA.

were in 1937," when the Tax Injunction Act was passed. *Rosewell* v. *LaSalle National Bank*, 101 S. Ct. 1221, 1234-1236 (1981). A federal injunction should not allow "state tax administration . . . [to] be thrown into disarray." *Id.* at 1236.

C. The Preemption Issue

The oil companies state that we do not ask this Court to decide "whether [TECA] correctly found conflict." Jt. M. at 22. Of course we do. Other assertions by appellees on the preemption issue similarly require brief response.

1. The oil companies rely heavily, Jt. M. at 20, as did the District Court and TECA, on the proposition that the burden of the tax would fall on non-New Yorkers, rather than be borne by the companies themselves (in the manner of an income tax). But, as we have pointed out, Juris. St. at 25, and will elaborate on plenary consideration, this proposition makes no economic sense. Furthermore, no factual evidence was taken by the courts in reaching this factual conclusion, which we have vigorously disputed, relying in part upon statements by the appellees themselves. *Id.**

2. Against the detailed outline we have presented of reasons showing that New York's passthrough prohibition is a rule of tax incidence, Juris. St. at 13-15, the appellees offer only language from legislative findings. Jt. M. at 21-22. This language, as we have already pointed out, Juris. St. at 15, is of no consequence. Significantly, the appellees do not attempt in this context to distinguish *First Agricultural National Bank*, *supra*, which clearly established that states may, as an integral part of their tax statutes, fix the ultimate economic incidence of a tax; the fact that *First Agricultural* was not a § 1341 case, irrelevant even to the § 1341 question, *see* p. 4 *supra*, is clearly of no avail to them on the preemption issue.

---

* If another State believed its citizens were burdened by the New York law, it could bring an action challenging the law under this Court's original jurisdiction, *see Maryland* v. *Louisiana*, 101 S. Ct. 2114, 2124-25 (1981). No State has done so.

Contrary to the appellees' assertion, Jt.M. at 28, we do not contend that a State may frustrate federal law so long as it has some purpose other than frustration. We assert that, even if the federal petroleum price program was intended to override all state regulations of petroleum prices—an incorrect proposition, we believe—it certainly did not intend to preempt state laws that affect prices only by exercising the traditional state authority to fix the incidence of a state tax. It would require a compelling showing to demonstrate that, in enacting and later revoking a system of price regulations, the federal government silently decided to abandon its deep tradition, Juris. St. at 16, of non-interference with the state tax power. That showing is utterly absent here.

3. The oil companies fail, as did the District Court and TECA, to recognize the primary significance of EPAA § 6(b), 15 U.S.C. § 755(b). By preempting only state price regulations "in conflict with" the federal program, § 6(b) clearly indicates that Congress believed some state price regulations would be deemed *not* to conflict with that program, and so be preserved.* This poses a simple question: if New York's passthrough prohibition is deemed a price regulation and has been preempted by the federal program of price control and decontrol, what state price regulations were not preempted?**

The oil companies have never answered this question because, even under their view that the New York law is a price

---

* The oil companies argue that § 6(b) does not provide the controlling standard because the courts must still determine whether the state law is an obstacle to the accomplishment of the federal purpose. This argument is untenable; the "obstacle" standard is part of the test of "conflict," *see, e.g., Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and so is included in the inquiry made under § 6(b). Section 6(b) indicates that some state price regulations will survive that inquiry.

** Under TECA's theory, not only price regulations but any law that made one state a less profitable marketplace than another would be preempted. Notwithstanding appellees' attempt to narrow the scope of this holding, Jt. M. at 23, the language and consequences of the TECA opinion are clear. Apdx. 8a; Juris. St. at 24-25.

regulation, it has less bearing on the federal program than any other state price regulation: at most, the state law prevents a company from charging the maximum price that the former federal regulations prevented it from exceeding, and it does so only by barring passthrough of one cost item, rather than by establishing a price level or a mechanism for determining prices. Juris. St. at 14-15.

4. We do not contend that Congress's purposes in enacting EPAA and EPCA were irrelevant to the administrative decision on whether or not to preempt state laws relating to petroleum prices. Cf. Jt. M. at 23-24. Given the broad delegation to the executive to craft the regulatory program, however, the decision on how broad the program's preemptive effect should be was completely that of the President and his delegate, now the Secretary of Energy. The courts should not substitute their own judgment as to whether the statutory objectives could best be achieved by preempting New York's law; their only function is to determine whether, to the requisite "high standard of certainty," the program actually adopted by DOE had that effect. Juris. St. at 7, 20-21.

In this connection, the oil companies distort our argument with respect to the DOE letters. Jt. M. at 28-30. We assert that DOE's responses are entitled to great deference in this case—even more than the nearly controlling weight usually accorded agencies' interpretations of their own regulations, *see* Juris. St. at 23—because the ultimate question is whether New York's law is an obstacle to the federal program of regulation and deregulation crafted by DOE and its predecessors.*

The oil companies assert that the Coleman letter—which was unqualified, composed without haste, and in response to an

---

* As the appellees point out, Jt. M. at 29, DOE declared in its letter on the New York law that it was intimating no opinion on the merits, as a matter of policy, of state petroleum taxes. Apdx. 104a. Naturally, DOE would not offer an opinion on *state* tax policy. But DOE's letter, by finding no conflict with federal law, necessarily indicated that it perceived no obstacle to *federal* regulatory policy.

inquiry by Mobil—is entitled to little weight because its discussion is brief. But Mr. Coleman wrote enough to indicate that, at least so far as deregulated products are concerned, the question is a simple one: revocation of federal price regulations was not intended to preempt pre-existing state powers. That Mr. Coleman's explanation may have been "curt" is of no consequence. *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

In short, the courts, in deciding whether New York's law is an obstacle to the success of the program crafted by DOE and its predecessors, cannot disregard the two letters by DOE—the only DOE expressions on the subject— that indicate there is no such obstacle. Because TECA's decision contradicts the opinion of the administrative agency, the issue is plainly a substantial one calling for plenary review.

5. Contrary to the oil companies' declaration, Jt. M. at 24-25, we do not challenge the wisdom of Congress in ending federal regulation of petroleum prices. Rather, we challenge the oil companies' interpretation of Congressional intent—a far different matter. For the reasons summarized in our Jurisdictional Statement, at 23-24, we assert that it makes no sense to believe that Congress intended to eradicate long-estabished state powers, either indefinitely or subject to spontaneous regeneration on September 30, 1981. In calling for a "gradual return to an unregulated market," Congress's intention was the same as when it used similar language at the end of World War II: to end the extraordinary federal intervention in the marketplace, not to nullify state powers that existed before the federal price regulation was enacted.

6. With respect to the now-revoked federal regulations, the oil companies mischaracterize our position by declaring that "[t]he State no longer denies that the federal regulations expressly authorized full recovery of all franchise tax increases . . . ." Jt. M. at 26. The federal regulations authorized nothing of the sort; they merely established a mechanism for determining a price maximum and prohibited oil companies

from exceeding that maximum.* There is nothing in the federal scheme suggesting that its purpose would be obstructed by state statutes that prevent oil companies from charging the maximum price that federal law would allow. Given the opportunity to declare that such statutes would obstruct its program, DOE indicated precisely the contrary. It is impossible, therefore, to infer from the federal scheme a right to violate such statutes. Most particularly is this so in the case of a state statute that affects prices only by determining the incidence of a tax; the federal price regulations were drafted and interpreted with the intention of accommodating, not overriding, state law in this area. Juris St. at 26.

---

* This fact renders inapposite *Maryland* v. *Louisiana*, 101 S.Ct. 2114, 2124-25 (1981), in which this Court invalidated a Louisiana tax on natural gas. Louisiana prohibited the gas owner from seeking any reimbursement of the tax from purchasers of the hydrocarbons extracted during processing. This provision, clearly designed to impose the tax burden on out-of-state purchasers of the gas, squarely conflicted with federal law because, as the Court noted, the federal regulatory agency "*insists* that the owners of liquefiable hydrocarbons bear a fair share of the expense associated with processing." *Id.* at 2130 (emphasis added). In the present case, the federal regulations did not insist on, or even authorize, passthrough of tax costs; they simply prohibited passthrough of certain costs and did not prevent passthrough of others.

CONCLUSION

For each of the reasons set forth above and in our Jurisdictional Statement, this Court should note probable jurisdiction, or in the alternative grant a writ of certiorari, to review the opinion and judgment of the court below.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
State Capitol
Albany, New York 12224
Attorney for Appellants

and

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
Co-Counsel for Appellants
Tully, Lynch and Koenig

Shirley Adelson Siegel
Solicitor General
Counsel of Record

Simon H. Rifkind
Edward N. Costikyan
Richard D. Friedman
Michael C. Lasky

Of Counsel

August 26, 1981